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In The
Supreme Court Of The United States
OCTOBER TERM, 1953

No. 128

THE COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, A BODY CORPORATE, ET AL.,
Appellants,

vs.

STATE MILK COMMISSION

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

APPELLANTS' MOTION FOR LEAVE TO FILE PETITION and PETITION FOR REHEARING

This motion and petition are filed following the order of the Court entered on January 18, 1954, in the above-entitled matter:

> "*PER CURIAM*: The judgment is affirmed. *Milk Control Board* v. *Eisenberg Farm Products*, 306 U.S. 346. Mr. Justice Black dissents."

Under amended Rule 33 the petition for rehearing was due 15 days later.

MOTION FOR LEAVE TO FILE PETITION

Appellant, by counsel, moves for leave to file this petition for rehearing after the 15 day period. Counsel gives as the reason for this motion his overlooking of the amendment to Rule 33. Counsel, in checking the time limit, initially was governed by the 25 day time of the original rule, until he found too late that the rule had been amended. This petition is being filed within the 25 day period.

Undersigned counsel certifies that this motion is made in good faith and not for delay; that time is not important in the case and will not prejudice appellee; and that this matter deserves rehearing by the Court for reasons stated below.

Wherefore, the Court is requested to grant leave to file this petition which follows.

Respectfully submitted,

MALCOLM D. MILLER, *Attorney for Arlington County Board.*

PETITION FOR REHEARING

With leave granted, appellant requests that the Court rehear the matter in the above-entitled proceeding, upon the following grounds:

1. There was insufficient time to argue the Commerce Clause issue in the original hearing, particularly because of limited time under the summary docket, and diversion of the argument at that time to the question of jurisdiction.

2. The *Eisenberg* case, which governed the Court in its *Per Curiam* decision, is not applicable to the Arlington situation here involved. Appellant contends, that, if the Court would rehear the matter, and fully explore the scope of the *Eisenberg* case, it would conclude that the cited case covers a distinguishable situation, and should not govern the Arlington case. The opinion in the *Eisenberg* case is sufficient, in itself, to show that it is not applicable, and was not intended to cover the Arlington factual situation.

ARGUMENT

The Eisenberg Case Is Not Applicable

The basic principle, upon which to distinguish the *Eisenberg* case from the Arlington situation, is found in many cases beginning with those which initiated Federal regulation by administrative agencies. The basic principle is that while States may regulate Commerce *within* a State, even though interstate commerce is incidentally affected, in the absence of regulation by Congress; a State has no power to regulate commerce directly between a point in the State and a point *outside* the State.

The first part of the above principle was established in the *Granger Cases* (*Munn* v. *Illinois* and others, 94 U.S. 113,

155, 164, 179, 180). The Supreme Court held, in those cases, that a State could regulate warehouses and railroads within a State even though interstate commerce was involved, in the absence of Congressional action. But, the latter part of the principle was established in *Wabash, &c., Railway Co.* v. *Illinois*, 118 U.S. 557; in which this Court held that Illinois had no power to regulate railroad rates between points in that State, on the one hand, and a point outside the State. As a result of this decision, Congress enacted the Interstate Commerce Act to cover a situation needing regulation over which the States had no control.

Factually, there is the same basic difference between the *Eisenberg* case and the Arlington situation. In the *Eisenberg* case the milk was purchased from Pennsylvania farmer-producers, at a Pennsylvania receiving plant, by Eisenberg as a Pennsylvania corporation. The transaction was entirely *within* Pennsylvania, and incidental to State regulation of intrastate commerce. The facts are quite similar, therefore, to those in the *Granger Cases*.

But the Arlington situation is different. Two-thirds of the milk consumed in the Arlington-Alexandria market area moves by trucks from the District of Columbia distributors directly to consumers and purchasers. All of the milk from the District of Columbia comes from producers in Maryland, Virginia, West Virginia, and Pennsylvania. This factual situation is like that in the *Wabash* case, in which this Court held that the States had no power to regulate rates (or prices).

It may be observed that the Arlington situation is primarily one of interstate commerce, with incidental regulation of intrastate commerce as a minor segment. On the other hand, as this Court pointed out in the *Eisenberg* case, the regulation of prices paid by Eisenberg was incidental to general State regulation of intrastate commerce. All of this

is emphasized in the *Eisenberg* opinion, as follows (306 U.S. 346, 352-353):

> "The purpose of the statute under review obviously is to reach a domestic situation in the interest of the welfare of the producers and consumers of milk in Pennsylvania. Its provisions with respect to license, bond, and regulation of prices to be paid to producers are appropriate means to the ends in view. The question is whether the prescription of prices to be paid producers in the effort to accomplish these ends constitutes a prohibited burden on interstate commerce, or an incidental burden which is permissible until superseded by Congressional enactment. That question can be answered only by weighing the nature of the respondent's activities, and the propriety of local regulation of them, as disclosed by the record.
>
> The respondent maintains a receiving station in Pennsylvania where it conducts the local business of buying milk. At that station the neighboring farmers deliver their milk. The activity affected by the regulation is essentially local in Pennsylvania. Upon the completion of that transaction the respondent engages in conserving and transporting its own property. The Commonwealth does not essay to regulate or to restrain the shipment of the respondent's milk into New York or to regulate its sale or the price at which respondent may sell it in New York. If dealers conducting receiving stations in various localities in Pennsylvania were free to ignore the requirements of the statute on the ground that all or a part of the milk they purchase is destined to another state the uniform operation of the statute locally would be crippled and might be impracticable. Only a small fraction of the milk produced by farmers in Pennsylvania is shipped out of the Common-

> wealth. There is, therefore, a comparatively large field remotely affecting and wholly unrelated to interstate commerce within which the statute operates. These considerations we think justify the conclusion that the effect of the law on interstate commerce is incidental and not forbidden by the Constitution, in the absence of regulation by Congress."

As the language of the *Eisenberg* case itself demonstrates, the Court was careful to apply the rule of the *Granger Cases*.

In another paragraph of the *Eisenberg* opinion, which follows those quoted above, the Court distinguished other decisions; and those other decisions followed the *Wabash* case principle. There are many other applications of the principle, as outlined below.

The *Wabash* principle was followed in two of the cases cited in the *Eisenberg* case, in which the U. S. Supreme Court held that a State could not regulate grain prices paid to farmers by elevators, including the margin of profit between the elevator cost and market prices outside North Dakota, *Lempke* v. *Farmers Grain Co.*, 258 U.S. 50. In *Shafer* v. *Farmers Grain Co.*, 268 U.S. 189, 199, the Court specifically pointed out the differences in the principles applicable to the different situations.

In milk cases the same distinction is made. In *Baldwin* v. *Seelig*, 294 U.S. 511, this Court held that New York could not regulate prices paid Vermont producers by New York distributors. In *Hood* v. *DuMond*, 336 U.S. 525, this Court held that New York could not regulate export of milk to Massachusetts. In *Highland Farms Dairy* v. *Agnew*, 300 U.S. 608, this Court said (p. 615):

> "Highland in Washington may sell to High in Vir-

ginia, and High may buy from Highland, at any price they please. Not till the milk is resold in Virginia within a market area will the price minimum apply, and then only to the price to be charged on the resale."

These cases differ from the *Eisenberg* case in that the transactions involved situations to and from points outside the State boundaries.

As stated in the *Eisenberg* decision (306 U.S. 352): "The question can be answered only by weighing the *nature* of the respondents *activities.*" The conclusion to be drawn from that statement is that, if the ***nature*** of the activity is one ***within*** a State, and regulated incidental to intrastate commerce, it is subject to State jurisdiction in the absence of Federal occupancy of the field. But, if the ***nature*** of the activity involves direct ***crossing*** of the State boundary, then the State has no power.

The above distinction is observed in tax cases, as illustrated by the difference between ***use*** and ***sales*** taxes, where the use is within a State, and the sale involves crossing a boundary. See *McLeod* v. *Dilworth Co.*, 322 U.S. 327. See also *Freeman* v. *Hewit*, 329 U.S. 249.

In transportation cases, the same distinction is observed. States are not allowed to "restrict the free flow of commerce across State lines:" *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 770, in which case this Court held that a State could not limit the length of trains moving through the State. In *Spector Motor Service Co.* v. *O'Connor*, 340 U.S. 602, this Court held invalid a franchise requirement to do business in a State as applied to a motor carrier engaged only in carrying goods across the State boundary.

In itinerant merchant cases, there is the same distinction. In *Memphis Steam Laundry* v. *Stone*, 342 U.S. 389, a privi-

lege tax was held invalid as applied to a Tennessee corporation which merely solicited business in Mississippi for laundry and cleaning done in Tennessee. See also the cases cited in that opinion. The distinction is quite clear in the peddler case of *Wagner* v. *Covington*, 251 U.S. 95. There, a manufacturer of soft drinks transported them from Cincinnati, Ohio, to Covington, Ky., and afterwards sold them in a peddling activity found to be subject to city license regulation in Covington. However, the Court also said (pp. 100-101):

> "It is indisputable that with respect to the goods occasionally carried upon plaintiffs' wagon from one State to the other in response to orders previously received at their place of business in Cincinnati, plaintiffs are engaged in interstate commerce, not subject to the licensing power of the Kentucky municipality."

Here there was a difference of activity *within* a State as contrasted with an activity *across* the boundary. The net result was much the same as between seller and buyers, and in the same vehicles, but there was enough difference in the *nature* of the activity to make a complete difference in the scope of the State powers.

In the Arlington situation, the record shows that about 75 percent of deliveries to consumers homes, by the leading District of Columbia distributors, are on a pre-order basis, and the remainder are changes in those orders arranged between the consumers and the delivery drivers (R. 74, 81). While there is some difference between milk and soft drinks, there should be no difference in the principle to be applied. The activity is not subject to State regulation.

The above-cited cases are not based upon "burdens" or "discriminations", and the like, which are problems in num-

erous cases under the Commerce Clause. The writer of this petition contends, however, that *only* in the cases involving activities *within* a State (*Granger Case* situations), should the question of discrimination or burdens be material. In the *Wabash* case, situations involving direct *crossing* of State lines, the State has no power; and the question of discrimination or burden is not material to the issues.

Likewise, the occupancy of the field by Federal legislation is material only in the *Granger Case* situations, as only the Federal government would have regulatory power in the *Wabash* type of activity. But there is exercise of Federal authority in this milk price regulation. Under Title 28, U.S. Code, sections 601, 608c, et seq., the Federal government regulates farmer-producer prices if the latter so desire. The only State regulation recognized in the statute is State cooperation in the Federal scheme, sec. 610i. Producer prices are at the base of all other prices, of course. The Virginia order sets producer prices, although the State Commission disclaims authority over sales to District of Columbia distributors. But it is impossible to regulate other sales without beginning with producer prices. When the farmer-producers voted-out Federal regulation in March 1947 (R. 30-31), State regulation supplanted Federal regulation which has been ousted and thwarted.

CONCLUSION

Appellant contends that this Arlington situation should come within the principle of the *Wabash* case line of precedents, as outlined above in which activities *across* the State line are not within the jurisdiction of the State; and that the *Eisenberg* case is not applicable because it comes under the different principle of the *Granger Cases* and others, involving activities *within* a State.

The Court is respectfully petitioned to rehear the matter, to determine whether it should change its order of January 18, 1954.

Respectfully submitted,

MALCOLM D. MILLER, *Attorney for Arlington County Board*

Munsey Building, Washington 4, D. C.

February 12, 1954.